Supreme Court, U.S.
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No. 91-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STUEBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES,

Petitioners,

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.

Respondents.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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Petitioners,

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JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JOHN N. EHRMAN AND EHRMAN INVESTMENT GROUP, INC.

STATUTES AND REGULATIONS INVOLVED

In addition to those statutes and regulations cited by Petitioners, the following are involved:

Securities Act of 1933, Section 13 (15 U.S.C. 77m)

> *Limitation of Actions*
> **Sec. 13:**
> No action shall be maintained to enforce any liability created under section 11 or section 12(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered to the public, or under section 12(2) more than three years after the sale.
>
> [As amended by Act of June 6, 1934, 48 Stat. 908.]

Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A.

> **Rule 56(e):**
>
> **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred

to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. Rules. Civ. Proc. Rule 56(f), 28 U.S.C.A.

Rule 56(f):

When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

I. STATEMENT OF THE CASE

1. OVERVIEW AND SUMMARY

The Ehrman Respondents do not agree with the "Overview and Summary" of the background of this case as presented by Petitioners. It is, in fact, misleading in several important respects. Petitioners would like the Supreme

Court to believe that Petitioners were arbitrarily denied the opportunity to have the case tried and that the trial court was hasty in ruling on Respondents' Motions for Summary Judgment before discovery in the case was completed. Petitioners filed this lawsuit on December 3, 1987 (R. 1). The trial court entered its first Scheduling Order on June 27, 1988 (R. 58). On January 3, 1989, the Court considered a Joint Motion to Amend the Scheduling Order and subsequently ordered Petitioners' counsel, together with Respondents' counsel, to jointly prepare a Discovery and Scheduling Order to submit to it for its approval which set forth the discovery and pretrial schedule (R. 195 at 60-62). At the January hearing, the Court advised that "the discovery schedule will be the only discovery permitted in the case from this moment forward" and admonished all counsel to participate completely and fully in the discovery (R. 195 at 61-62).

The Discovery and Scheduling Order, which was drafted jointly by Petitioners' counsel and Respondents' counsel and approved by the Court, extended the discovery cut-off to April 30, 1989, thereby extending discovery to a period of approximately seventeen (17) months after the lawsuit had been originally filed (R. 161). The Order set aside thirty-three (33) days out of a four (4) month period for depositions to be held (R. 161). The Order provided that all motions had to be filed by June 15, 1989 and that all responses were due by July 10, 1989 (R. 161). The Order further specified that a Final Pretrial Conference would be held on July 28, 1989 at 9:30 a.m. for "the hearing and disposition of Motions pending at the time" (R. 161 at 7).

Petitioners also try to support their argument that the ruling on the Motions for Summary Judgment was premature by stating, in effect, that they were denied the opportunity to take the deposition of Respondent John Ehrman ("Ehrman"),

characterized as the "Principal Defendant," which deposition Petitioners aver they attempted to take more than six (6) times. The Discovery and Scheduling Order set Ehrman's deposition for March 14 - 17, 1989 (R. 161 at 3). Nevertheless, on March 8, 1989, Petitioners' counsel unilaterally announced that he was postponing Ehrman's deposition to an unspecified time in the future (R. 208 at 4; R. 187 at 5-6). He thereafter noticed it for August 7 - 11, 1989 (R. 191) and later moved up the date to July 24 - 27, 1989 (R. 207), three months after the discovery cut-off and the same week that the final Pretrial Conference was scheduled.

It is also significant to note here that the Discovery and Scheduling Order reserved the week of July 24, 1989 for the hearing and disposition of pending motions (R. 161 at 7). The Order was entered by the Court on March 21, 1989 setting forth July 28, 1989 at 9:30 a.m. specifically for such conference (R. 161 at 7). Petitioners received considerably more than the ten (10) day notice requirement of Rule 56(c), F.R.C.P. cited by Petitioners.

Petitioners also make references to an investigation by the Securities and Exchange Commission which they claim was pending against Respondent Ehrman at the time the instant suit was filed. This was not a matter that was before the trial court and Petitioners efforts to cloud (or taint) the issues in this matter with what happened in another lawsuit filed a year after the judgment in this case is not evidence in this lawsuit and is highly improper. Further, Petitioners make several references to their being victims of a "ponzi scheme." Petitioners did not offer any evidence in the trial court that the actions taken by the Respondent-Defendants were anything more than "normal business practice." (R. 251 at 15).

2. THE DISTRICT COURT'S OPINION

The District Court's grant of summary judgment was based on its finding that there were no material fact issues in dispute, including the fact that the claims made were barred by the applicable statutes of limitations. The trial court found, on the basis of the summary judgment evidence submitted by the Defendants (the Petitioners herein), that all but four (4) of the Plaintiffs had purchased their interests on or before November 30, 1984, and that the others (except for one whom the Court found had no standing to bring suit) had purchased their units before May 1, 1985 and that the Plaintiffs did not bring suit to complain of their purchases until after December 3, 1987 (R. 251 at 12 - 13 and 9 - 10). The Court further found that the information furnished to the Plaintiffs concerning their investments and the documents they signed necessary to subscribe to those purchases put them on notice, at least by May 1, 1985, to investigate the alleged misrepresentations and omissions and therefore, their claims under Section 12 of the Securities Act of 1933 (15 U.S.C. 771) and Section 10-b of the Securities Exchange Act of 1934 (15 U.S.C. 78j-5) were time barred under the one year and two year statutes of limitations (R. 251 at 10 - 13).

The trial court further found that the summary judgment evidence offered by the Defendants established that the actions taken by the Defendants were legitimate business practices and that the Plaintiffs failed to present evidence that there were facts in dispute concerning the alleged RICO violations. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) (R. 251 at 15 - 16).

3. THE COURT OF APPEALS' AFFIRMANCE

The Panel of the Fifth Circuit also concluded that Petitioners had completely failed to satisfy their burden in the

trial court of presenting evidence establishing each of the challenged elements of their case for which they would bear the burden of proof at trial. *See Celotex*, 477 U.S. at 322.

4. STATEMENT OF BACKGROUND AND FACTS

Respondents do not agree with Petitioners' statement of background and facts. The trial court found the following based on uncontradicted summary judgment evidence presented by the Respondents:

Petitioners were fifteen of seventy-seven investors in a limited partnership called Onshore Exploration Ltd., 1984 Mid-Year Drilling Program ("Onshore"). Petitioners brought suit against twenty-three (23) Defendants seeking damages under Sections 12(1) and 12(2), 15 and 17(a) of the Securities Act of 1933, as amended [15 U.S.C. Sections 771(1) and (2), 77o, and 77q(a)]; Section 10(b) of the Securities Exchange Act of 1934, as amended [15 U.S.C. Section 78(j)] and Rule 10b-5 thereunder [17 C.F.R. Section 240.10b-5]; the Racketeer Influenced and Corrupt Organization Act, the "RICO Act" [18 U.S.C. Section 1964(c)]; the Texas Securities Act [Tex. Rev. Civ. Stat. Ann., art. 581-33]; and for common law fraud and deceit, breach of fiduciary duty and "other conduct alleged to be in violation of the laws of the State of Texas." The litigation was spearheaded by two of the Petitioners who were former employees of one of the limited partnership's general partners, Ehrman Investment Group, Inc. ("EIG"), and who had entered into a dispute with Ehrman and EIG (the "Ehrman Respondents") over back salaries and fees.

Onshore entered into oil and gas drilling agreements with Respondents Houston Petroleum Company ("HPC"), Rio Bravo Oil Company ("Rio Bravo") and Kelly Onshore Drilling Co., Inc. ("Kelly Onshore"). Pursuant to these

agreements, a total of seventeen (17) wells were drilled, ten (10) of which were commercial producers. Several payments of dividends were made to investors before the wells and their production were assigned to Respondent Rockwood Insurance Co. ("Rockwood") to pay for the amount due on notes of investors who had defaulted.

The offering of Units was made primarily to accredited investors pursuant to Rule 506 of Regulation D (17 C.F.R. Section 230.506) promulgated by the Securities and Exchange Commission. Offerings made pursuant to Regulation D and Rule 506 are exempt from the registration requirements of Section 5 of the Securities Act of 1933, as amended (15 U.S.C. Section 77e) and from the registration requirements of the Texas Securities Act (Tex. Rev. Civ. Stat. Ann., art. 581). Regulation D permits the offering to be made to not more than thirty-five (35) non-accredited investors and does not limit the number of offers and sales to accredited investors. (While the Court did not state such a finding in its Order, the offering of Units was not made to more than thirty-five (35) non-accredited investors [T. 240 at 2]).

An investor could subscribe to a Unit by either paying cash or by executing a promissory note for the full payment of his subscription. Sales of the Units were made to a total of seventy-seven (77) investors, including fourteen of the fifteen Petitioners. Six of the Petitioners defaulted in the payment of the promissory notes which they executed in connection with their respective subscription to the Units.

EIG, which guaranteed the payment of the loan made to Onshore by Respondent Interdiscount, Ltd. ("Interdiscount"), was sued by Rockwood as a result of the default by several investors, including six of the Petitioners, in paying the amount due on the promissory notes executed

at the time of their respective subscription to the Units. EIG and Onshore filed a counterclaim in the present action seeking payment of the amount due on said notes from six of the Petitioners.

Onshore began its solicitation of investments in November, 1984 and employed a private placement memorandum (the "Memorandum") dated September 30, 1984. Onshore thereafter updated the Memorandum as of November 30, 1984. Both the Memorandum and its update clearly stated that the investments were speculative investments with a high degree of risk of loss of the entire investment in the partnership. The November 30, 1984 Memorandum stated that the offering termination date was December 31, 1984. In January, 1985, Onshore forwarded a document to each investor who had subscribed on or before December 31, 1984 which permitted each subscriber to rescind his respective purchase of a Unit(s) or to re-affirm the purchase. Any investor who subscribed to a Unit prior to December 31, 1984 and who did not elect to affirm his earlier subscription had his subscription canceled.

In contrast, Petitioners' Statement of Background Facts contains several allegations that are largely unsupported or insignificant. Petitioners allege that "It was public notice that Respondent Ehrman's alleged wrongful conduct ... continued until the SEC obtained permanent injunctive relief in June, 1990..." This statement is not only unsupported, but it is also clearly improper. Petitioners, in preparing a Petition for Writ of Certiorari, are limited to relying on those matters which were before the District Court and that are in the record. The District Court entered its Final Judgment on December 15, 1989. Petitioners' allegations as to what subsequently occurred in June 1990 are therefore clearly improper.

II. SUMMARY OF THE ARGUMENT

Petitioners' arguments have no real substance. Petitioners' criticism of the Fifth Circuit's holdings show a fundamental misunderstanding of securities law, the methods by which statutes of limitations are interpreted and the applicable standards for Motions for Summary Judgment. Furthermore, the recently enacted Section 27A of the 1934 Securities Exchange Act does not change the outcome of this case.

III. ARGUMENT

1. The Fifth Circuit's rulings regarding the trial court's findings and concerning the application of the statute of limitations were proper and in conformity with applicable precedents.

Petitioners claim that the Fifth Circuit held "that disclaimers in an offering memorandum served to absolutely shield Respondents from all charges of securities fraud regardless of the circumstances" and that "[t]he panel's holding that all Petitioners should have known about Respondents' alleged securities fraud by May 1, 1985" directly conflicts with precedent.

These statements betray a basic misunderstanding by Petitioners of securities law as well as of the Fifth Circuit's holding. Petitioners' argument misses the point: the controlling date for purposes of the running of the respective statutes of limitations for the purposes of this case is when a purchaser of securities knew, or in the exercise of reasonable diligence should have known of the alleged wrong doing. Section 13 of the Securities Act of 1933 (15 U.S.C. 77m); *Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1066

(5th Cir. 1986); *Wood v. Combustion Engineering, Inc.*, 643 F.2d 339, 341-346 (5th Cir. 1981); *Doran v. Petroleum Management Corporation*, 576 F.2d 91 (5th Cir. 1987).

The District Court's fixing of a date when all Petitioners knew or should have known of the wrongs allegedly committed by the Respondents is not in conflict with the decision in *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9 (5th Cir. 1967) which is distinguishable on the facts; in the instant case there was no showing of the presence of a fiduciary relationship or evidence of fraudulent concealment. In the instant case, the District Court did not decide the factual issues but simply determined that there were no factual issues to be tried. *Azalea*, 386 F.2d at 10.

The Court of Appeals' ruling is entirely consistent with its holding in *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186 (5th Cir. 1988), *cert. denied*, 488 U.S. 926, 109 S. Ct. 310 (1988). The Court, in *Isquith*, cited by Petitioners, said the standard for determining the adequacy of disclosure is whether the information disclosed would have been misleading on those points about which the information's adequacy is questioned, *to a reasonable investor who read the information as a whole*. *Isquith*, at 207, emphasis ours. In addition, unlike the situation in *Isquith*, in the instant case the Petitioners failed to offer summary judgment evidence to support the allegations in their complaint or to counter Respondents' summary judgment evidence that Petitioners knew or should have known by the exercise of reasonable diligence of the alleged fraud by May 1, 1985. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 936 (1992), cited by petitioners, also holds at p. 1264 that if the record is devoid of evidence necessary to sustain plaintiff's burden of proof (as is the case here), the

defendant, which bears no burden at all, is entitled to judgment in its favor.

2. *The Fifth Circuit acted properly in upholding the District Court's grant of summary judgment.*

Petitioners claim that the Fifth Circuit Panel's application of Summary Judgment standards was improper. The Ehrman Respondents and several of the other Respondents filed their Motions for Summary Judgment (R. 198-202) on June 15, 1989, the deadline set by the District Court's Scheduling Order (R. 161). Responses to such motions pursuant to the Scheduling Order were due by July 10, 1989 (R161). Petitioners did not file their response to the Ehrman Respondents' motion as well as the summary judgment motions of the other Respondents until July 27, 1989 and July 28, 1989 (R. 214 - 218) and for this reason alone, the Court could have deemed these Respondents' motions as being unopposed.

In addition, the summary judgment motion of the Ehrman Respondents directed the District Court's attention to specific deficiencies in the Petitioners' claims and was supported by affidavits and exhibits (R. 199). The response of Petitioners to this motion was not supported by Petitioners' affidavit, was replete with conclusory statements, categorizing the motions of the Ehrman Respondents as "completely lacking in merit" and stating generally that "Factual issues abound with respect to every issue in this case," referred to "volumes of deposition testimony taken to date," and did not address several of the grounds raised in the Ehrman Respondents' Motion for Summary Judgment (R. 214, p. 13). Petitioners responded only to paragraphs 1(a), 1(b), 1(c) and 4 of the Ehrman Respondents' motion. The Ehrman Respondents in replying to Petitioners' response to

their Motion for Summary Judgment, called the District Court's attention to the fact that assuming Petitioners had responded timely to paragraphs 1(a) through 1(c) and paragraph 4 of said Respondents' motion, Petitioners should still be deemed to have acquiesced and consented to the relief requested in other paragraphs of said Respondents' motion (R. 229).

In responding to paragraph 1(b) of the Ehrman Respondents' Motion for Summary Judgment, Petitioners completely failed to furnish any evidence or cite any authorities to rebut the evidence and authorities offered by the Ehrman Defendants concerning the bar of the one-year statute of limitation to Petitioner's claims under Section 12(2) of the Securities Act of 1933. The District Court was justified under these circumstances in finding that the investors were not diligent in bringing their claims under the Securities Act of 1933 into Federal Court (R. 229 pp. 3 and 4).

While Petitioners did not respond to paragraph 1(d) of the Ehrman Respondents' motion discussing the two-year statute of limitations applicable to actions under the Securities Exchange Act of 1934, the same standard of diligence required of investor Plaintiffs under Section 12(2) of the Securities Act of 1933 applies to claims made under the 1934 Act. (R. 229, p. 4) *Swenson v. Engelstad*, 626 F.2d 421 (5th Cir. 1980); *Breen v. Centex Corp.*, 695 F.2d 907 (5th Cir. 1983).

Petitioners completely failed in their response to the Ehrman Respondents' Motion for Summary Judgment to present any evidence or cite any authorities to buttress their RICO claim (R. 199, pp. 4-7; R. 229, p.3; R. 214).

In sum, mere conclusory allegations are not summary judgment evidence. *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127 (5th Cir. 1989); *Semon v. Royal Indemnity Company*, 279 F.2d 737 (5th Cir. 1960).

The Petitioners also claim in their brief that the District Court erred in granting summary judgment to all of the Respondents in view of the recitations of contested issues in the Respondents' Proposed Pre-Trial Order filed with the Court on August 28, 1989. The Petitioners are in error on this point. Upon a proper showing that there is no genuine issue to be tried, a judge may grant a motion for summary judgment wholly irrespective of a pre-trial order specifying a number of issues being contested. *Irving Trust Company, et al. v. United States of America*, 221 F.2d 303 (2nd Cir. 1955), *cert. denied* (1955) 350 U.S. 828, 76 S. Ct. 59, 100 L.Ed. 740. Even where a pre-trial order specifies that certain issues should be tried, the trial judge may subsequently grant a summary judgment on the ground that those issues are not really in dispute. *Securities and Exchange Commission v. Murphy*, 626 F.2d 633 (9th Cir. 1980); Moore, *Federal Practice*, Vol. 6, Part 1, P. 56.02[5] at 56-37 and 56-38 (1990). The function of the summary judgment motion is to sift the proofs pro and con as submitted in the various affidavits and exhibits attached thereto, so that a determination may be made, without the expense and delay of a trial, that there are or are not real, as distinct from mere fictitious or paper issues, which must be disposed of in the traditional manner by trial to the Court or jury. *Irving Trust Company, et al. v. United States of America, supra* at 305.

The Petitioners also argue that the District Court was in error in ignoring the deposition of Respondent Joel A. Middlebrook which Petitioners allege tended to show a solicitation of investors through "dog and pony shows" and

in violation of certain requirements of Rule 502(c) of Regulation D [17 C.F.R. Sec. 230.502(c)] promulgated under the Securities Act of 1933, as amended. Not only did Petitioners fail to mention the deposition of Respondent Middlebrook in their response to the Ehrman Respondents' Motion for Summary Judgment, but even assuming the deposition was part of the evidence considered by the District Court in its ruling, there is nothing in Petitioners' response that refers to any evidence in the deposition or otherwise that would tend to show that the running of the respective statutes of limitations on their claims made under the federal securities acts was tolled. *Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1066 (5th Cir. 1986); *Wood v. Combustion Engineering, Inc.*, 643 F.2d 339, 341-46 (5th Cir. 1981).

In spite of the usual rule that all doubts are resolved against the moving party, if the movant presents credible evidence that would entitle him to a directed verdict if not controverted at trial, this evidence must be accepted as true on a motion for summary judgment when the party opposing the motion does not offer counter-affidavits or other evidentiary matter supporting his contention that an issue of fact remains, or does not show a good reason, in accordance with Rule 56(f) Fed. R. Civ. P., why he is unable to present facts justifying his opposition to the motion. *Celotex*, 477 U.S. at 322-324, 326. Petitioners, in their brief, misconstrue the impact of *Celotex* on the instant case: Where the Respondents were able to show by the summary judgment evidence the absence of a fact issue, they were entitled to summary judgment when the Petitioners failed to call evidence to the attention of the Court to dispute that contention. Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, Vol. 10A, Section 2727 at 31, 1992 Pocket Part. A Court is not required to search the entire record in a case to ensure that the record is "bereft of a

genuine issue of material fact" before a summary judgment can be had. *Nissho-Iwai American Corporation v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988). A dispute as to an immaterial fact does not preclude summary judgment. *Church of Scientology of California v. Cazares*, 638 F.2d 1272 (5th Cir. 1981); *Houston North Hospital Properties v. Telco*, 688 F.2d 408 (5th Cir. 1982).

3. Respondents' Motions for Summary Judgment were timely and proper.

Petitioners claim that they were "railroad[ed]" by illegitimate and premature motions for summary judgment. In making this claim, Petitioners fail to explain why a motion for summary judgment would be premature when it is made nineteen months after the suit is filed, one and a half months after the close of discovery and only two (2) months before the scheduled docket call. *See Celotex*, 477 U.S. at 326. Furthermore, since the Scheduling Order, agreed to by all counsel, required all motions to be filed by June 15, 1989, Respondents' Motions for Summary Judgment were definitely not premature.

Petitioners seek to cloud the issues by mischaracterizing some subsequent events involving Ehrman and the Securities and Exchange Commission. Since such facts are not properly before the Court (or supported by evidence in the record), Respondents will not comment on Plaintiffs' statements further, other than to say that Petitioners' description of the subsequent events is inaccurate.

4. The recently enacted Section 27A of the 1934 Securities Exchange Act does not change the outcome of this case.

Petitioners state that the newly enacted Federal Deposit Insurance Corporation Improvement Act of 1991 may resurrect their claims. Said Act, which added Section 27A of the Securities Exchange Act of 1934 (15 U.S.C. 78 (aa)-1(b)) clearly does not do so. The only actions which are to be resurrected by said new section are the following:

> (b) EFFECT ON DISMISSED CAUSES OF ACTION -- Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991:
>
> (1) which was dismissed as time barred subsequent to June 19, 1991; and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the enactment of this section.

Petitioners' claims were dismissed on October 4, 1989.

CONCLUSION

Petitioners have not only made several misstatements of law and fact in their Petition, but have also failed to show any misapplications of law in the Fifth Circuit's holding, any conflict between the Circuits or any other reasons for the Supreme Court to consider their case. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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